In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 446

LOUIS J. TAGLIANETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the District of Rhode Island on three counts of wilfully attempting to evade his income tax for the years 1956, 1957 and 1958, in violation of 26 U.S.C. 7201 (R. 6, 12–14, 473).[1] He was sentenced to concurrent prison terms of seven months on each count and was fined $1,000 on each count (R. 7). The court of appeals affirmed (Pet. 47).

The government's case was proved by the expenditures method, a variant of the net worth method.

[1] "R." refers to petitioner's appendix in the court below. "Supp. R." refers to the government's appendix in the court below.

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The proof showed that in each of the three years petitioner's non-deductible expenditures greatly exceeded his reported income, after he was given credit for all non-income sources of funds, and that he thus had a substantial unreported income and tax liability for each year (R. 347–352).[2] Petitioner denied ownership of stocks, bonds, real estate or any other property (R. 704, 721). He did not own his own home (R. 307, 721). When asked about currency in his possession during the years 1956 through 1961, petitioner stated to the Treasury agents that he maintained a $10,000 fund, which "would be the money that I would borrow so that I could use to finance my horse playing" (R. 706); and that he did not use it for any purpose except gambling (R. 719).

In the computation, petitioner was given credit for $15,000 borrowed from a loan company in 1956 and 1957 (R. 228, 346, 355, 383, 419, 426). Petitioner informed the agents that the only loan he had made was $15,000 loaned in 1947 to one Merola, who died in 1958 (R. 44, 311, 704). There was evidence that Merola repaid $1,000 of this loan in 1956 (R. 42–43, 420) and that in the same year Merola signed a $14,000 note in favor of petitioner for the balance (Supp. R. 5–6). In 1959 petitioner sued Merola's executor for the $14,000 alleging that Merola had "refused and still does refuse to pay * * * any part thereof" (Supp. R. 6; cf. R. 438).[3]

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[2] Petitioner's returns reported salary income and his alleged net winnings from parimutuel betting (R. 35–36). He had no records and no bank accounts (R. 734, 735).

[3] The Merola transaction was the subject of other conflicting testimony (compare R. 42–52 with R. 310–311).

The defense called an expert witness who attempted to account for the excess funds used for expenditures as having come from cash on hand and repayments on the Merola loan (R. 421–423, 426, 430). Much of the pertinent testimony relied upon by the defense with respect to the Merola loan (R. 42–52) was later stricken (R. 438).

The petition for certiorari was filed on August 28, 1968, 41 days after July 18, 1968 (Pet. 47), when the court of appeals entered judgment. Therefore, it was out of time under this Court's Rule 22(2) and for that reason should be denied. In no event is there any error, any conflict, or any other reason for further review.

1. The argument (Pet. 8–14) that the proof did not permit a finding that petitioner's expenditures in excess of available declared resources came out of current income is without merit. As the trial court pointed out (R. 488–489): "* * * the jury could reasonably infer and find that the defendant had no investments, no cash accumulations, and that * * * the only funds available to him from January 1, 1956 through December 31, 1960 were a $10,000 'bank roll' borrowed by him from banks and used by him as principal for his activities at race tracks, and that he was unable to use, and as he claimed did not use, this money for any other purpose except for those activities." The evidence shows that the possibilities that the excess expenditures arose from non-income sources were canvassed during the investigation and

all results favorable to petitioner were allowed in the government's computations. The issue the jury[4] had to decide was whether these expenditures had come from taxable sources or whether, as the defense contended, they arose from cash on hand and from repayments by Merola on the $15,000 loan (R. 416–432). Whether petitioner received payments from Merola of significant sums during the prosecution years was the subject of widely variant statements by petitioner to the agents (R. 310–311). However, the jury could readily infer that no more than $1,000 was repaid during the prosecution years because the original amount in 1947 was $15,000 and the amount sued for in 1959 was $14,000, *supra*.

Petitioner urges (Pet. 8–14) that it was incumbent on the government to reconstruct his net worth as of the beginning and end of each year. Most of the cases relied upon by petitioner are pure net worth cases and of course it is settled that in those cases the net worth at the beginning and end of each year must be clearly established. *Holland* v. *United States*, 348 U.S. 121, 132. Other cases, in which the requirement is stated merely by way of dictum, are cases in which no accurate picture of a taxpayer's finances can be presented without a complete analysis of his net worth at the various pertinent times. *Hoffman* v. *Commissioner*, 298 F. 2d 784, 786–787 (C.A. 3); *United*

[4] Having adduced testimony on his own behalf, petitioner waived the motion for acquittal made at the close of the government's case. *United States* v. *Calderon*, 348 U.S. 160, 164.

States v. *Caserta,* 199 F. 2d 905, 906 (C.A. 3).[5] This is not such a case. In an expenditure case it is necessary for the government to prove that the defendant's private expenditures substantially exceed his available declared resources. *United States* v. *Johnson,* 319 U.S. 503, 517. As the court below pointed out, to insist upon a complete list of assets and liabilities (particularly where there are so few) for each year would "mistake form for substance" (Pet. 52). The important thing is the proof that the excessive expenditures came from current taxable income rather than from a prior accumulation or from non-taxable sources; that proof is present here.

2. Nor is there merit in the argument (Pet. 14–19) that admissions made by petitioner to the agents should have been excluded because he was not warned of his right to counsel under *Miranda* v. *Arizona,* 384 U.S. 436. In the first place, the requirements of *Miranda* do not apply to this case, for the trial was concluded before *Miranda* was decided (R. 490). *Johnson* v. *New Jersey,* 384 U.S. 719. Moreover, *Miranda* requires that warnings be given a person who "has been taken into custody or otherwise deprived of his freedom of action in any significant way * * *." (384 U.S. at 444). Although the admissions were made in the office of the Internal Revenue Service, petitioner was not in

[5] In still another case, *Olinger* v. *Commissioner,* 234 F. 2d 823 (C.A. 5), no investigation whatever appears to have been conducted to establish that the expenditures were made from current taxable income.

custody and in no manner was deprived of his freedom of action when he provided the evidence in question. The courts of appeals have uniformly rejected contentions that the *Miranda* warning is required in such circumstances, and there is no reason for a different result here.[6] See, *e.g.*, *Schlinsky* v. *United States*, 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Spinney* v. *United States*, 385 F. 2d 908 (C.A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz*, 22 A.F.T.R. 2d 5120 (C.A. 2), petition for certiorari pending, No. 383, this Term; *United States* v. *Mancuso*, 378 F. 2d 612 (C.A. 4), certiorari denied, 390 U.S. 955; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[7] *United States* v. *Maius*, 378 F. 2d 716 (C.A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7), certiorari denied, 389 U.S. 1015; *Frohmann* v. *United States*, 380 F. 2d 832 (C.A. 8), certiorari denied, 389 U.S. 976; *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[8]

[6] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 348 (D. Ariz.), and *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.), which petitioner claims to be in conflict with other decisions (Pet. 14–18), each have been overruled by a court of appeals decision in the same circuit.

[7] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

[8] There is no merit in the charge (Pet. 18–19) that petitioner was deliberately misled into believing that only the years 1959 and 1960 were under investigation. On February 9, 1962, peti-

3. After petitioner's notice of appeal was filed, but before any briefs were filed, the government advised the court below that petitioner might have been affected by unlawful eavesdropping conducted by the FBI on premises not belonging to petitioner. The court below remanded the cause to the district court for hearings on this issue. Having held such hearings and made findings of fact, the district court concluded (R. 636–648) that petitioner's conviction had not been affected by the unlawful eavesdropping. The court of appeals agreed (Pet. 61–67).

Petitioner's objection to the trial court's *in camera* inspection (Pet. 19–22) relates to records of electronic surveillance conducted on occasions when, according to the government's representations (R. 523–527) and the trial court's findings (R. 638), petitioner was not a party to the conversation recorded. Perhaps, in providing ~~those~~ materials, the government was overly generous to petitioner. See our brief in *Alderman* v. *United States*, No. 133, October 1967 Term.[9] Surely, he was entitled to no more. Petitioner and the government were in agreement that petitioner could not assert an interest in examining recorded conversations in which he was not a participant on the prem-

tioner was asked to identify his 1956, 1957 and 1958 returns (R. 309, 325). The long interview on April 23, 1962, ranged widely over the years 1956 through 1960 (R. 701–725). Thus, although the investigation began with the years 1959 and 1960, it was obvious that it later was expanded to include the earlier years, with no attempt being made to mislead petitioner.

[9] A copy of that brief is being served on petitioner's counsel together with this opposition.

ises in question (R. 528). The *in camera* inspection was for the sole purpose of having the court make sure the government was adhering to its representation that it had made available to petitioner all records reflecting conversations to which he was a party. This was a proper procedure. Cf. *Palermo* v. *United States,* 360 U.S. 343, 354. Unlike *Dennis* v. *United States,* 384 U.S. 855, 874, and *United States* v. *Coplon,* 185 F. 2d 629 (C.A. 2), on which petitioner relies (Pet. 22), this case does not raise the problems of feasibility that are present when a trial judge is asked to read voluminous grand jury testimony for the purpose of evaluating its relevance to the trial testimony.

4. There is no substance in the contention (Pet. 22–27) that a new trial must be granted because an FBI agent monitored a phone call made by petitioner to an attorney (R. 743). The trial court determined that the conversation so overheard related only to petitioner's civil tax liability for the year 1961 and had nothing to do with the instant case (R. 643–648). The court below properly held that neither *Black* v. *United States,* 385 U.S. 26, nor *O'Brien* v. *United States,* 386 U.S. 345, mean "that one isolated illegal intrusion on attorney-client conversations on matters demonstrably separate from the instant proceedings automatically requires a new trial" (Pet. 63). Where, as here, it is quite clear that the monitored conversation between a defendant and his attorney bears no relation whatever to the offense charged, a new trial is not required. *Granello* v. *United States,* 386 U.S. 1019.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968